persons as to the negroes: "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them because of their color. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations implying inferiority in civil society; lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It is possible that some qualifications are necessary to this statement (*People* v. *Gallagher*, 93 N. Y. 438); but, taking it as substantially true, I am not aware of any reason why that which is here said of the scope of the protection and immunity afforded by these clauses to the blacks is not also true as regards any other "person." That part, therefore, of the excepting clause of the statute now in question, which purports to exclude tribal Indians from the benefit of it, appears to be contrary to the Constitution of the United States.

It is urged that, if this be so, the court must hold the whole statute unconstitutional, because, otherwise, a judicial tribunal would, in effect, be legislating Indians into the privileges of the statute, and giving them a benefit which the Legislature never intended that they should have. But I think this argument rather plausible than sound. It is well settled that a part only of a statute may be held to be void and the rest remain in force. "When part of a statute is unconstitutional, that will not authorize the Court to declare the remainder of the statute void unless all the provisions are . . . so connected in meaning that it cannot be presumed that the Legislature would have passed one without the other." *Com.* v. *Hitchings*, 5 Gray, at p. 485; Sedgwick on Construction of Stat. and Const. Law, 2d ed., 43, note (*a*). In this case the Legislature gave a general right, and excluded from it what may fairly be supposed to be a small class of persons. This exclusion is unconstitutional; but there is nothing to indicate that the Legislature regarded the exclusion as an essential part, or in any other light than as a quite subordinate part of their general purpose.

Exceptions overruled.

CLUB COURTS.

SUPREME COURT OF THE POW-WOW.

Fire Insurance. Loss occasioned by the felonious Act of the Wife of the Assured. Rights of the Insurer.

The facts were these: A insured B's house. B's wife, C, without the connivance of B, maliciously burned the house with the intention of enabling B to get the insurance money. A, having paid the policy to B, sues C. The argument against recovery is that A's only remedy is to be subrogated to the rights of B against C; but as a husband cannot sue his wife, A has no remedy whatever against C. This reasoning would undoubtedly prevail in England today. [*Cf. Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561.]

Admitting, however, that there is no room in this case for a remedy in equity by way of subrogation, is not this a case which is covered by the common-law action on the case? The action on the case is extremely elastic. It is said in Com. Dig., Act. on Case A, — "In all cases, where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages."

A principle as broad as this is certainly required to explain the following cases: (1.) X frightens away boys who are going to Y's school, and their parents keep them at home. Y has an action against X. (2.) M has a market with toll for horses sold; N is bringing a horse to market when R drives him away. M has an action against R (cited by Ld. Holt in *Keeble* v. *Hickeringill*, 11 East, 573, *note*).

In *Tarleton* v. *McGawley*, Peake, 205, the master of a vessel had an action against X for firing a cannon at negroes and preventing them from trading with the plaintiff's vessel. *Tarleton* v. *McGawley* is cited with approval in *Walker* v. *Cronin*, 107 Mass. 555. [Cf. also *Rice* v. *Manley*, 66 N. Y. 82.] The principle stated in Comyns, however, requires this qualification: the damage to the plaintiff must be the natural consequence of the defendant's act. The principle is very well stated in *Cunnington* v. *Great N. W. R. R. Co.*, 49 L. T. R. 392. The defendant was employed to deliver X's casks to the plaintiff, who was accustomed to fill them with ketchup. The defendant carelessly delivered other casks, which had been filled with turpentine. The plaintiff did not discover the mistake, and lost all the ketchup which he put into them. The court says: "Wherever the circumstances disclosed are such that if the person charged with negligence thought of what he was about to do, he must see that unless he used reasonable care there must be at least a great probability of injury to the person charging negligence against him, either as to his person or property, then there is a duty shown to use reasonable care."

In *Riding* v. *Smith*, 1 Ex. D. 91, A was held liable to B for maliciously injuring his business by slandering B's wife, C.

In the *Conn. Mut. Life Ins. Co.* v. *N. Y. & N. H. R. R. Co.*, 25 Conn. 265, it is intimated that, if the company had caused an accident which would result in the death of X, for the purpose of injuring Y, who had insured X's life, Y would have a right of action against the company.

As a logical result of the cases cited, it would seem to follow that if C wilfully or negligently destroyed a house owned by B, and insured by A, C would be liable to both B and A. This, however, is not the law. C is liable to B only, though A, after paying the insurance, has an equitable claim to any amount which B may collect as damages from C. It seems that the true reason for this decision is that the contract of insurance is a contract of indemnity, and by means of subrogation the insurance company is generally fully protected; hence, there is usually no need of resorting to an action on the case. But in the present case, owing to the peculiar relations between B and C, the insurance company is not protected by subrogation. It is conceived, therefore, that a strict application of the principles at the foundation of the common-law action on the case will permit the company, in place of its ordinary remedy, to proceed directly against the wrong-doer. The language of the court in *Conn. Mut. Life Ins. Co.* v. *N. Y. & N. H R. R. Co.*, as far as it goes, is authority for this position.